

Obtaining Neutral Services¹

I. Introduction

Once your agency has designed an ADR program it will need individuals who are competent to act as neutrals. Neutrals come from a variety of sources: from within the agency (Internal), from within another federal agency (Inter-Agency Program on Sharing Neutrals, hereinafter "Sharing Neutrals Program" or "shared neutrals"), or from the private sector (External). In this chapter we will explore the available options for obtaining neutral services and the pros and cons of each source of neutrals; questions to consider in neutral roster development; roster management; selecting an appropriate neutral; and finally, neutral evaluation.

The Administrative Dispute Resolution Act of 1996 defines a neutral as "a permanent or temporary officer or employee of the federal government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve."

This chapter contains eight steps designed to assist you through the process of selecting neutrals for your agency's program by offering step-by-step guidance. The lists provided are not meant to be exhaustive, rather, they will help guide you through the process and should raise questions relating to each part of the selection process.

II. Selecting a Neutral

STEP 1: Consider All Options for Obtaining Neutral Services

Some initial considerations can help you decide which source of neutrals is best for your agency. For example: Does the agency have funds to cover the cost of neutrals? Most neutrals charge for their services by the hour, however, some can be free of charge; e.g., collateral duty federal employees from your agency or from another federal agency. It is also necessary to establish agency policy and

¹ Authored by Kim Brown, ADR Attorney, United States Postal Service, Andrew Colsky, ADR Attorney, United States Postal service, Don Greenstein, ADR Attorney, United States Postal Service, and Judy Filner, Academy of Family Mediators.

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practice about who may act as a neutral for your agency's program including what type of training they have received, their experience and how they will be evaluated. Some organizations choose to

Establish their own training to certify neutrals in the use of a particular ADR technique.

An ADR program administrator must consider the agency's program goals and the type of program being administered before determining which neutrals will best serve the program. There are many qualified neutrals who are willing and able to contract with your agency, so you should have a clear understanding of the type of neutral you are seeking and the qualifications you require.

Many agencies have opted to set up a pilot program using one of the sources of neutrals: internal, external, shared neutrals. In many pilot projects, the use of shared neutrals has helped to keep costs low while allowing evaluation of the pros and cons of the program's design. The results of the pilot program(s) will assist in determining whether to use internal or external neutrals and the dispute resolution technique, e.g., mediation, that best serves your agency. Agencies should also consider the numbers and types of disputes commonly addressed when determining the source and number of neutrals for their panel. If your agency has a limited number of cases and limited funds, then hiring outside neutrals may not be an option.

Roster management capacity is another key consideration in deciding what source of neutrals will work best for your agency. The agency's program manager will need to decide whether he has the ability to manage the neutrals that participate in the program. He will also need to decide whether to develop an internal cadre of employee-neutrals, use existing sources of non-agency employees, recruit and develop a roster of external professional neutrals, or some combination thereof. Managers of smaller programs may find it impractical to develop their own roster of neutrals, however, they may be able to join together with other programs (same agency, small agencies or larger agencies) to share sources of neutrals or tap into other, already developed rosters. The Interagency Program on Sharing Neutrals, discussed below, is a well-established program that has a number of qualified neutrals available to agencies.

STEP 2: Evaluating the Pros and Cons of Internal, Shared, and External Neutrals

A. Internal Roster

There are many reasons why an agency may or may not want to develop a cadre of agency employees to act as neutrals for internal disputes. Some of these reasons are provided below:

1. Benefits

- Employees perform as neutrals as a collateral duty so there is no direct cost for neutral services.
- Employees know the culture of the organization and may have special insights into internal disputes.
- Trained employees become "champions" for ADR within the agency.

2. Risks

- Collateral duty employees may be perceived as biased toward one side based on their role within the agency (management or employee).
- Internal mediator must be vigilant about confidentiality. There is a risk of breach with agency peers leading to an opportunity for additional disputes within the workplace.
- They may lack subject matter expertise and the experience of private external neutrals (generalist v. specialist).

B. Shared Neutrals (Interagency Program on Sharing Neutrals)

If your program uses mediation, there are individual federal employees who have received mediation training to act as mediators and who are capable of mediating internal federal agency disputes. The Interagency Program on Sharing Neutrals exists throughout the federal sector for collateral duty use of trained federal employee mediators. The program has existed for over five years and allows participating agencies to tap the roster for use of trained co-mediation teams (a senior trained mediator mentoring a less experienced individual) at no charge to the requesting agency. The use of shared neutrals comes with some of the same risks as using an internal agency mediator. However, since these neutrals do not come from inside the disputant's agency, there can be an additional level of comfort and trust for both sides.

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1. Benefits

- As collateral duty, no cost for mediation services.
- Employees know the culture of the federal government and may have special insights into federal agency disputes.
- Trained employee/mediators become "champions" for ADR within the federal sector.

2. Risks

- Collateral duty federal employees may be perceived as biased toward one side based on their role within the federal government, management or employee, and thus be perceived as lacking neutrality.
- The neutral may have no familiarity with the culture of the agency in question and its practices.
- The neutral may lack subject matter expertise of private outside neutral (generalist v. specialist).
- To participate in the Sharing Neutrals program the requesting agency must reciprocate by providing mediators to the roster pool (who can act as neutrals on a collateral duty basis as requested). For a small agency or an agency without any mediators or employees willing to be collateral duty mediators there are other options such as providing administrative services to the roster managers (Department of Health and Human Services, Board of Contract Appeals, ADR Office).
- The ADR program administrator may lose quality control, and there may be no one vouching for the mediator's level of skill.
- The roster manager may restrict the choice of neutrals.
- There may be difficulty in scheduling neutrals for mediations, due to the neutral's limited availability.

C. External Neutrals

In addition to the use of an internal or shared neutral roster, an agency may also consider using a pool of external neutrals. An external neutral is a professional who is not employed in any capacity by the federal government. If your agency is considering the use of external neutrals, it must determine whether to develop a roster from scratch or to use an existing source such as a private ADR provider. It is important to know whether the parties or the provider will choose the neutral for a particular dispute.

1. Benefits

- Using highly trained and experienced mediators ensures a high quality of services.
- External neutrals provide additional assurance to the appearance of neutrality.
- Parties may feel more comfortable with an external than an internal mediator.
- Using external neutrals allows for specific expertise, if necessary.
- Real or perceived problems related to confidentiality are avoided.
- Case scheduling may be easier than with shared neutrals.

2. Risks

- The neutral may not be familiar with the culture of the federal sector or within the particular agency.
- The cost of external neutral services is higher than using internal or shared neutrals.

STEP 3: Weigh the Program Goals Against the Pros and Cons

Review the program's goals and objectives and evaluate the pros and cons of using internal, shared or external neutrals. Criteria may be chosen based upon the factors listed above but should also be supplemented based on the agencies' own needs. Good design practice suggests having a brainstorming session with management, employees and others that would use the program to decide what type of neutral to use.

The decision to use internal or shared federal neutrals is often made because of real or perceived budget constraints. Your agency may choose to create a training program for these neutrals to familiarize them with the needs of your program. However, if the budget will allow, develop a pilot program to test each approach on a trial basis.. Pilots prove to be cost effective and allow an agency to evaluate its results based on the program goals and the criteria developed for making the decision.

III. Practical Considerations in Developing Roster of Neutrals

STEP 4: Consider the End Product

When creating an internal or external roster a federal agency must consider what the end product ADR program will look like. Who will operate, manage, and oversee the roster? What type of matters will the program serve? Will it only involve workplace disputes or will each and every internal and external dispute have access to the agency ADR roster? Will the neutrals be transformative, facilitative or directive in their approach. Will they have any substantive expertise? These questions must be considered when developing an appropriate pool of neutrals.²

What are your agency's ADR needs: facilitation, convening, mediation, or other? At what levels does the agency have these needs? In which subject areas? Contracts, workplace disputes, labor disputes, civil rights disputes (internal or external), other? Brainstorming through creating an inventory...which provides a check list of needs and available solutions. Bring in a facilitator for the brainstorming session. Mentor others on additional ADR methods as the program is designed.

How will the issue of confidentiality be addressed? You may want some expert legal advice on this topic.

How will your agency conduct recruitment efforts?

How and who shall manage the roster? Who should receive applications, review applications, approve and tentatively assign neutrals?

What professional development activities can be conducted for roster members in the way of training, answers to frequently asked questions, and difficult situations? Will your agency support brown bag lunches or ongoing in-service training?

² The following is adapted from the Environmental Protection Agency Roster Project Working Group, by Charles Pou, Jr.

IV. Managing an ADR Program

STEP 5: Establish an Administrative Process

Generally, roster management refers to case assignment and other administrative matters. The individual or office that manages the roster will have numerous responsibilities and functions related to overseeing and monitoring the ADR program and providing neutrals to parties requesting ADR services. There may also be duties related to follow-up after a process is completed. Follow-up ensures that all matters completed in an ADR process are closed or returned to the appropriate system for further action as needed. E.g. an EEO case that comes to ADR needs to be mediated in a timely manner and closed, or referred back to EEO for the next administrative steps, as the EEO process has administrative deadlines that the agency must follow. ADR may expedite the process but it cannot delay an EEO administrative deadline. The following list includes items that the roster manager and the agency must address.

A well-managed program will usually have staff assigned to:

- Handle the Intake Process
 - ♦ Develop, distribute and manage forms such as intake and referral forms.
 - ♦ Be responsible for responding to inquiries about the process.
 - ♦ Supervise the intake process.
- Develop Roster Criteria and Guidelines
 - ♦ Develop minimum criteria, policies and guidelines pertaining to the listing of neutrals on the roster.
 - ♦ Set standards for roster listing and ongoing certification of neutrals.
 - ♦ Develop and conduct training of neutrals, whether internal or external.
 - ♦ Develop and manage standard agreements with neutrals concerning their roles, responsibilities (and fees, where relevant) in the program. See Manual.
 - ♦ Create Standards of Practice for the agency, which should include, agency and other appropriate -- standards of ethics (See *Manual, Chapter 7, Ethical Consideration*), minimum training, certification, approval of neutrals, and actions taken when neutrals fail to follow program rules or act inappropriately or illegally.

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- Manage the Roster
 - ♦ Review and approve neutrals' applications.
 - ♦ Take calls from neutrals.
 - ♦ Introduce agency staff (EEO, Procurement, Human Resources, etc.) to the dispute resolution program and how the roster will be managed.
- Schedule Cases
 - ♦ Match cases with neutrals selected.
 - ♦ Schedule mediations (includes coordinating mediator(s), complainant, respondent and any representatives either party brings to the table.
 - ♦ Address ADR session logistics, such as room location.
 - ♦ Address case closing logistics.

V. Selecting an Appropriate Neutral

STEP 6: Assess the Neutrals' Training and Experience

A program manager may have to select a neutral or a proposed list of neutrals from a roster, or from a list of qualified neutrals compiled for a particular case. In doing so, considerations should include the neutral's particular qualifications, experience and training.

Once you have determined the necessary requirements of the neutral for the type of cases your program addresses, in the areas of training, education, experience and if appropriate, subject matter expertise, it may be useful to formalize them in some way. Establishing minimum criteria brings clarity and credibility to your program by crystallizing the requirements for neutrals. By doing so, an objective standard is set. This standard becomes especially important when employees, who may not be qualified, want to serve as neutrals in your cases.

If your program uses external neutrals, it may also be helpful to create a tool that gathers all of the background information on each prospective neutral. This tool might take the form of a questionnaire that requires the neutral to detail his or her experience in the areas that you deem appropriate. Generally, the shorter the better; however, if it is essential that your neutral have subject matter

expertise, your form should include pointed questions. For example, asking for the number of cases in which the neutral has participated and the specific issues addressed in those cases.

The breadth of ADR processes complicates the task of selecting an appropriate neutral. Your agency's program may limit the number of ADR processes available to focus its energies on developing one or two proven methods. Some agencies have had good success with mediation and use that as their sole option for certain types of disputes. Other agencies may use ADR options that do not require a roster of neutrals, such as an ombuds office. Neutrals who serve in the program should be able to describe the ADR process they use including its strengths and weaknesses.

STEP 7: Assess Additional Considerations

While it is suggested that an agency factor in a neutral's training and experience, the selection of an appropriate neutral is not a science. Following are seven additional factors to be considered when selecting an appropriate neutral:

1. What is the forum of the dispute?

On the agency intake form, or in the initial telephone interview with the participants, inquire about the nature of the dispute, the forum in which the dispute will be heard if ADR is not used or does not resolve all of the issues, and the status of the dispute in that forum. The choice of a neutral will depend in part on the nature of the dispute and the context in which it is to be resolved, if ADR is not used.

For example, if the dispute is a complex legal case currently scheduled for trial in a federal court, arbitration, early neutral evaluation, mini-trial or mediation might all be viable ADR choices. However, it may be the practice of the court to retain complete or partial control over the selection of the process and/or the neutral. Or, it may be possible for the agency, in cooperation with the assistant United States attorney to participate in selecting a process and/or a neutral with the opposing party.

Alternatively, the dispute may still be in its early stages, outside of any legal proceedings. These matters can also benefit from the use of ADR. In this case, the potential forum may still be important in selecting a neutral either because process expertise is important to resolving the matter, or because the forum may help define the required substantive knowledge of the neutral. If

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the agency chooses to use ADR outside the court annexed process it can circumvent the issues that may arise when a court selects the process and the neutral works for the court program.

2. What is the proposed or required timing of the use of ADR?

The most obvious reason to consider timing is the availability of the neutral. Before selecting a neutral, or sending the participants a list of names, find out when all necessary parties are available to participate in the ADR process.

Timing can also affect the nature of the ADR process the parties and agency agree upon, and thus the selection of a particular neutral.

3. What type of ADR is most appropriate for the dispute?

The ADR goals of the disputants are extremely important when selecting a neutral. Their goals may include resolving an interpersonal dispute, reaching a settlement, getting an “advisory opinion” or a reality check about the strengths and weaknesses of their positions in a legal matter, or may even be limited to developing a trial preparation strategy, the equivalent of a pre-trial order.

Neutrals vary greatly in their abilities to manage ADR processes consistent with the disputants’ goals. For example, some mediators adopt a more directive approach than others, or focus on settlement. This approach may be entirely inappropriate for a case in which the parties do not desire a directive approach.

Further, the disputants may have different goals, or may not be able to articulate their goals beyond “reach a settlement.” They may need some guidance from the program administrator to help them think about how each ADR process might meet the needs of their dispute or help each side reach acceptable resolution. In particular, disputants often are unaware of the flexibility that a facilitative mediation offers in identifying goals and process options related to their dispute.

The ADR process selected has an obvious effect on which neutral is chosen. The agency roster may not include names of individuals who are experienced in some of the ADR processes, such as mini-trial or non-binding arbitration. The court in which a disputed matter is to be heard may also limit ADR process

choices. Some courts prefer only certain processes, or limit the parties' selection of an ADR process. An ADR program coordinator may only be familiar with one or two processes, and thus unknowingly limit party choices. Or, a program coordinator may choose to limit the choices for budget, timing or other administrative reasons.

4. Does the ADR neutral need substantive expertise?

This depends on the nature of the dispute and the ADR or settlement goals of the participants. Program managers, participants and their representatives often look for more substantive expertise than is necessary. The more specialized, technical, or complex the dispute, or the more evaluative or judge-like the neutral's anticipated role, the more likely it is that substantive expertise will be important to the resolution. This is true for two reasons; the parties will have more confidence in the neutral, and the neutral's familiarity with the subject matter will aid the parties in developing and selecting productive options.

5. What procedural experience and/or expertise should the neutral possess?

As mentioned above, match the neutral's experience with the ADR process that is being considered. It is important to review the neutral's overall experience with different types of ADR because she or he will be more likely to give the parties accurate and appropriate advice about the selection of alternative processes, if necessary.

Mediators tend to have different styles and forums in which they most often practice, or in which they are most comfortable. In general terms, some mediators are "settlement-oriented," strongly steering the participants to reach a settlement. Others are facilitative, encouraging the parties to talk through the problem and try to reach their own resolution. Facilitative mediators often address more than the initial stated dispute. You will, over time, develop a sense of which mediator orientation is the best for the participants and the case you are referring.

Non-ADR process experience might also be an important consideration. Resolving a complex agency matter may best be supported by a neutral who has significant experience in the agency process the parties will use if the case is not resolved through ADR.

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6. What are the costs associated with the neutral's services, if any?

The cost of neutrals is just one factor, albeit an important one, in the selection process. Neutral services can be provided at no direct charge (e.g., the Sharing Neutrals program) or cost upwards of \$400 per hour. There are times when agencies have no resources with which to pay for neutral services and must choose from no, or low cost sources or collateral duty employees. If your agency has resources and chooses to use outside neutrals, a thorough investigation, including the previous five considerations, will help determine the most appropriate neutral. A careful investigation is especially important if your agency is considering a neutral at the high end of the fee scale.

7. What are the policy considerations?

Agencies should develop their policies on neutral selection with certain factors in mind. These policy considerations include controlling quality, maximizing program neutrality, reducing delay and administrative burden, and managing cases that might have public significance. Additionally, think through the policy implications of neutrality and confidentiality (mentioned elsewhere in this resource manual) related to using internal neutrals, the sharing neutrals program, and external neutrals.

VI. Evaluating Neutrals

STEP 8: Measure the Neutral's Effectiveness

Once you have created an ADR process, you will need to develop tools to evaluate the effectiveness of your program's neutrals. Your program's success, in large part, hinges on the quality and credibility of your neutrals. Evaluation tools are essential because as your conflict management program evolves it must continually meet the needs of its users and evaluation results tend to reflect how well a program is doing.

There are a number of different tools available depending upon resources and the program you have created. Two available tools that have provided useful information are the observation method, and the post-mediation survey of parties and their representatives.

- A. Observation of the** If your program decides to institute specialized training for your

Neutral

cadre of neutrals, the program coordinator or roster manager may sit in on training sessions and observe role-plays for each neutral. The neutrals can then be rated and evaluated to determine if they will be called upon when needed.

Additionally, the program coordinator or roster manager who has developed experience observing neutrals can sit in the ADR session (with the parties' permission) and observe new neutrals to determine if they meet the standards set by your agency. (Any observer who sits in on a session must abide by the applicable rules of confidentiality.)

**B. Post-Mediation
Survey of the
Parties and their
Representatives**

A written or oral survey can be developed which the parties will be asked to complete at the end of the ADR session. Working with a research/evaluation partner to design this tool is advisable. The survey should be designed to capture subjective perceptions of the parties and the neutral. The parties' responses will help the program coordinator to modify and improve the program's design with respect to neutrals, based on this feedback.

VII. Summary

The success of any conflict management program will depend heavily on its neutrals. If the neutrals are poorly equipped to handle the types of disputes your agency experiences, users may leave with negative experiences that they share with co-workers. This can cripple an otherwise well-designed program.

It is important to evaluate the neutrals that your agency uses in terms of their dispute resolution training, type and amount of experience, style, any special expertise, and ability to provide what you need when you need it. This evaluation process is a continuing one that starts before the neutral is selected and continues in the form of observation and post-use surveys.

Because program development is a continuing process, you can refine your choice of neutrals as well as their necessary qualifications based upon follow-up and the feedback you receive from program users. Your agency's program will continue to improve as its roster of neutrals is improved.

NEUTRALS CHECKLIST

- ✓ Have you decided to use internal, shared, or external neutrals?
- ✓ What types of disputes will your program cover?
- ✓ Who will operate, manage and oversee the roster of neutrals?
- ✓ Who will select an appropriate neutral and what criteria will be used?
- ✓ Who will be assigned to handle the intake process?
- ✓ Who will schedule cases?
- ✓ Have you designed a system to choose the best neutrals for a particular case?
- ✓ What style of dispute resolution will the neutrals practice?
- ✓ How will you evaluate the neutrals' performance?
- ✓ Have you designated the person responsible for follow-up after the ADR process?